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NOT FOR PUBLICATION

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8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 NORTHERN DIVISION

11 In re:) Case No. 9:16-bk-11912-DS
12 CHANNEL TECHNOLOGIES GROUP,) Chapter 11
13 LLC,) Adversary No. 9:18-ap-01058-DS
14)
15) Debtor.
16)
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27)
CORPORATE RECOVERY)
ASSOCIATES, LLC, as Trustee for the)
Liquidating Trust of Channel Technologies)
Group, LLC,)
Plaintiff,)
v.)
BLUE WOLF CAPITAL PARTNERS,)
LLC, BLUE WOLF CAPITAL FUND II,)
L.P., GLADSTONE INVESTMENT)
CORPORATION, BLUE WOLF CAPITAL)
ADVISORS, L.P., BW PIEZO HOLDINGS,)
LLC, FIDUS INVESTMENT)
CORPORATION, FIDUS MEZZANINE)
CAPITAL II, L.P., AVANTE MEZZANINE)
PARTNERS SBIC, LP, AVANTE)
MEZZANINE PARTNERS II, INC.,)
PENGDI HAN, DHAN, LLC, GRANT)
THORNTON, LLP, CTG ADVANCED)
MATERIALS, LLC, CTS CORPORATION,)
ELECTRO OPTICAL INDUSTRIES,)
DUFF & PHELPS, AND CIT BANK, N.A.,)
Defendants.)
Date: March 18, 2019
Time: 3:00 p.m.
Place: United States Bankruptcy Court
Courtroom 201
1415 State Street
Santa Barbara, CA 93101

This matter comes before the court on the following motions to dismiss the First Amended Complaint (the “Complaint”) of the plaintiff, Corporate Recovery Associates, LLC, as Trustee for the Liquidating Trust of Channel Technologies Group, LLC (the “Liquidating Trustee”), pursuant to Fed. R. Civ .P. 12(b)(6):¹ (1) Amended Notice of Motion and Motion to Dismiss Claims Against Grant Thornton LLP in the First Amended Complaint for (1) Avoidance of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A), 550(a); (2) Avoidance of Constructive Fraudulent Transfer Under 11 U.S.C. § 548(a)(1)(B); (3) Actual Fraud; (4) Constructive Fraud; (5) Unjust Enrichment; and (6) Conversion; Memorandum of Points and Authorities in Support Thereof (the “Grant Thornton Motion,” Docket No. 34) filed December 12, 2018; (2) Motion of Defendants Fidus Investment Corporation, Fidus Mezzanine Capital II, L.P., Avante Mezzanine Partners SBIC, LP, Avante Mezzanine Partners II, Inc. to Dismiss the First Amended Complaint (the “Mezzanine Defendants’ Motion,” Docket No. 49) filed December 21, 2018; (3) Notice of Motion and Motion to Dismiss Claims Against Defendants CTG Advanced Materials, LLC and CTS Corporation in the First Amended Complaint; Memorandum of Points and Authorities (the “CTGAM & CTS Motion,” Docket No. 63) filed January 7, 2019; and (4) Notice of Motion and Motion to Dismiss the First Amended Complaint by Defendants, Blue Wolf Capital Partners, LLC, Blue Wolf Capital Fund II, L.P., Blue Wolf Capital Advisors L.P., and BW Piezo Holdings, LLC (the “Blue Wolf Entities Motion,” Docket No. 69) filed January 8, 2019. The Liquidating Trustee opposes each of the motions.

The court, having considered the pleadings and arguments of counsel, will grant each of the motions with leave to amend based upon the following findings of fact and conclusions of

¹ Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. “Rule” references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California (“LBR”).

1 law made pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and applied to
2 adversary proceedings in bankruptcy cases.

3 I. STATEMENT OF FACTS

4 Channel Technologies Group, LLC (“CTG”) is a privately-owned California limited
5 liability company founded in 1959. Prior to bankruptcy, CTG’s business operations were based
6 in Santa Barbara, California. It also possessed a manufacturing site in Littleton, Massachusetts.
7 CTG designed, manufactured and sold piezoelectric ceramics, transducers, sonar equipment and
8 related products. Its customers included United States defense contractors such as Northrop
9 Grumman, Lockheed Martin, and Raytheon. The United States Navy was the primary user of
10 CTG’s sonar technology.

11 In December 2011, BW Piezo Holdings, LLC (“BWP”), a Delaware limited liability
12 company, acquired 100% of CTG’s member interests from Alta Properties, Inc., f/k/a Channel
13 Technologies, Inc. Blue Wolf Capital Fund II, L.P. (“BWCF”), an investment fund managed by
14 Blue Wolf Capital Advisors, L.P., is the majority owner of BWP.

15 Due to the financial impact of certain onerous long-term supply contracts, CTG began
16 experiencing severe cash flow problems in 2016. CTG made changes to its management team,
17 and in April 2016, CTG executed a Loan and Security Agreement with BWCF, as lender and
18 secured party, dated April 20, 2016, under the terms of which CTG received cash infusions from
19 BWCF to fund operations and capital expenditures. In consideration therefor, CTG granted
20 BWCF a security interest and lien on substantially all its personal property. When it became
21 apparent that its net losses would continue unabated, CTG elected to seek bankruptcy protection.

22 On October 14, 2016, CTG filed its voluntary petition under chapter 11 of the Code “to
23 expeditiously pursue a sale of its business and assets and an orderly wind down of the remaining
24 business.”² According to CTG’s Schedule D filed on November 16, 2016, CTG owed BWCF

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27 ² Disclosure Statement in Support of Debtor’s Proposed Chapter 11 Liquidating Plan, dated Nov.
7, 2017 (Docket No. 411) filed Nov. 7, 2017, at 18:25-26.

1 under the Loan and Security Agreement on the petition date the principal sum of \$2,860,000,
2 plus accrued interest, attorneys' fees and costs, secured by collateral having a value of
3 \$14,993,218.

4 On December 6, 2017, CTG filed Debtor's Proposed Chapter 11 Liquidating Plan which,
5 in pertinent part, provided for (1) the establishment of a liquidating trust, the vesting of all of
6 CTG's assets, including potential causes of action held by the estate, in the liquidating trust on
7 the effective date of the plan, and (2) the appointment of a trustee to liquidate the assets for
8 payment of allowed claims in the case. An Order Confirming Chapter 11 Liquidating Plan was
9 entered on March 2, 2018.

10 On October 12, 2018, the Liquidating Trustee commenced this adversary proceeding
11 against Blue Wolf Capital Partners, LLC, BWCF, Blue Wolf Capital Advisors, L.P., and BWP
12 (collectively, the "Blue Wolf Entities"), Fidus Investment Corporation, Fidus Mezzanine Capital
13 II, L.P., Avante Mezzanine Partners SBIC, LP, Avante Mezzanine Partners II, Inc. (the
14 "Mezzanine Defendants"), Gladstone Investment Corporation, Pengdi Han, Dhan, LLC, Grant
15 Thornton, LLP ("Grant Thornton"), CTG Advanced Materials, LLC ("CTGAM"), CTS
16 Corporation ("CTS"), Electro Optical Industries, Duff & Phelps, and CIT Bank, N.A., seeking
17 the avoidance and recovery of alleged actual and constructive fraudulent transfers under state
18 and federal law, and the award of an unspecified amount of actual damages for alleged unjust
19 enrichment, conversion, and breach of fiduciary duty, together with reasonable attorneys' fees
20 and costs. Seven of the Liquidating Trustee's 11 causes of action are predicated on an alter ego
21 theory of recovery. The Grant Thornton Motion, Mezzanine Defendants' Motion, CTGAM &
22 CTS Motion, and the Blue Wolf Entities Motion were timely filed pursuant to Rule 12(b)(6) and
23 seek dismissal of the Liquidating Trustee's Complaint. After a hearing on March 18, 2019, the
24 matters were taken under submission.

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1 II. DISCUSSION

2 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.
3 §§ 157(b) and 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),
4 (B), (H) and (O). To the extent that the claims made the basis of the Liquidating Trustee's
5 Complaint constitute “Stern claims,”³ Grant Thornton, the Mezzanine Defendants, CTGAM &
6 CTS, and the Blue Wolf Entities do not consent to entry of a final order or judgment by the
7 bankruptcy court.⁴ Venue is appropriate in this court. 28 U.S.C. § 1409(a).

8 A. Standards for Pleading Under Rules 8(a) & 9(b) and for Dismissal Under Rule 12(b)(6)

9 1. Rules 8(a) and 12(b)(6).

10 Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint
11 for failure to state a claim upon which relief can be granted.⁵ F.R.Civ.P. 12(b)(6). “The purpose
12 of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints
13 without subjecting themselves to discovery.” Rutman Wine Co. v. E.&J. Gallo Winery, 829
14 F.2d 729, 738 (9th Cir. 1987); see Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797,
15 802-03 (7th Cir. 2008) (“[A] defendant should not be forced to undergo costly discovery unless
16 the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a
17 substantial case.”).

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19 ³ “These claims are called ‘Stern claims,’ so named after the Supreme Court’s decision in Stern
20 v. Marshall, 564 U.S. 462 (2011). Stern claims are claims ‘designated for final adjudication in
21 the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a
22 constitutional matter.’” Mastro v. Rigby, 764 F.3d 1090, 1093 (9th Cir. 2014) (citation omitted).

23 ⁴ Absent consent or waiver, this court lacks jurisdiction to enter a final order or judgment on a
24 fraudulent transfer claim against a person or entity that has not filed a proof of claim against the
25 bankruptcy estate. See Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins.
26 Agency, Inc.), 702 F.3d 553, 565-66 (9th Cir. 2012). Dismissal with leave to amend, however,
27 does not implicate Stern v. Marshall because it does not end the litigation on the merits. See
28 Goodman v. H.I.G. Capital, LLC (In re Gulf Fleet Holdings, Inc.), 491 B.R. 747, 791 (Bankr.
W.D.La. 2013).

29 ⁵ Rule 12(b)(6) is applicable to adversary proceedings by FRBP 7012(b).

Under Rule 8(a) a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ F.R.Civ.P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). “[A] complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). The trial court need not accept as true conclusory allegations in a complaint, or legal characterizations cast in the form of factual allegations. See Twombly, 550 U.S. at 555-56.

In evaluating a Rule 12(b)(6) motion, the Court must engage in a two-step analysis. First, the Court must accept as true all non-conclusory, factual allegations made in the complaint. Based upon these allegations, the Court must draw all reasonable inferences in favor of the plaintiff. Second, after accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must determine whether the complaint states a plausible claim for relief.

Screen Capital Int’l Corp. v. Library Asset Acquisition Co., Ltd. (In re ThinkFilm, LLC), 510 B.R. 266, 272 (C.D. Cal. 2014) (citations omitted). “While the facts alleged in a complaint may turn out to be ‘self-serving and untrue,’ a court at this stage of [a] proceeding is not engaged in an effort to determine the true facts. The issue is simply whether the facts the plaintiff alleges, if true, are plausibly sufficient to state a legal claim.” Arnold v. First Citizens Nat’l Bank (In re

⁶ Rule 8(a) is applicable to adversary proceedings by FRBP 7008(a).

1 Cornerstone Homes, Inc.), 567 B.R. 37, 46 (Bankr. W.D.N.Y. 2017) (quoting Doe v. Columbia
2 Univ., 831 F.3d 46, 48 (2d Cir. 2016)).

3 “A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory,’
4 or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” Johnson v.
5 Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008). A claim cannot be plausible
6 when it has no legal basis.

7 2. Applicability of Rule 9(b).

8 Rule 9(b) states that, “[i]n alleging fraud or mistake, a party must state with particularity
9 the circumstances constituting fraud or mistake.” F.R.Civ.P. 9(b).⁷ Rule 9(b)’s heightened
10 pleading standard applies not only to allegations of fraud, but to claims grounded in fraud. See
11 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (The pleading of a
12 “claim . . . said to be ‘grounded in fraud’ or to ‘sound in fraud’ . . . must satisfy the particularity
13 requirement of Rule 9(b).”); Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141
14 (C.D. Cal. 2003) (“[I]n the Ninth Circuit . . . both claims for fraud and negligent
15 misrepresentation must meet Rule 9(b)’s particularity requirements.”).

16 Rule 9(b) demands that, when averments of fraud are made, the circumstances
17 constituting the alleged fraud “be ‘specific enough to give defendants notice of
18 the particular misconduct . . . so that they can defend against the charge and not
19 just deny that they have done anything wrong.’” Averments of fraud must be
20 accompanied by “the who, what, when, where, and how” of the misconduct
charged. “[A] plaintiff must set forth more than the neutral facts necessary to
identify the transaction. The plaintiff must set forth what is false or misleading
about a statement, and why it is false.

21 Vess, 317 F.3d at 1106 (citations omitted) (emphasis in original). Allegations under Rule 9(b)
22 must be stated with “specificity including an account of the ‘time, place, and specific content of
23 the false representations as well as the identities of the parties to the misrepresentations.’”
24 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). “Conclusory
25 allegations are insufficient.” Neilson, 290 F. Supp. 2d at 1141.

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27 ⁷ Rule 9(b) is applicable to adversary proceedings by FRBP 7009.

1 To satisfy the specificity requirement of Rule 9(b), “a plaintiff who makes allegations on
2 information and belief must state the factual basis for the belief.” Neubronner v. Milken, 6 F.3d
3 666, 672 (9th Cir. 1993); see Zatkin v. Primuth, 551 F. Supp. 39, 42 (S.D. Cal. 1982)
4 (“Allegations of fraud based on information and belief usually do not satisfy the degree of
5 particularity required under Rule 9(b). However, an exception exists where, as in cases of
6 corporate fraud, the plaintiffs cannot be expected to have personal knowledge of the facts
7 constituting the wrongdoing. In such cases, a complaint based on information and belief is
8 sufficient if it includes a statement of the facts upon which the belief is based.”). Moreover,
9 “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
10 ‘require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and
11 inform each defendant separately of the allegations surrounding his alleged participation in the
12 fraud.’” Swartz, 476 F.3d at 764-65; see In re Silicon Graphics, Inc. Sec. Litig., 970 F. Supp.
13 746, 752 (N.D. Cal. 1997) (“Rule 9(b) also requires that a plaintiff plead with sufficient
14 particularity attribution of the alleged misrepresentations or omissions to each defendant.”).

15 3. Court’s Inquiry is Not Limited to the Allegations of the Complaint.

16 “In deciding Rule 12(b)(6) motions, courts are not strictly limited to the four corners of
17 complaints.” Outdoor Cent., Inc. v. GreatLodge.com, Inc., 643 F.3d 1115, 1120 (8th Cir. 2011).
18 Courts may consider

19 matters incorporated by reference or integral to the claim, items subject to judicial
20 notice, matters of public record, orders, items appearing in the record of the case,
21 and exhibits attached to the complaint whose authenticity is unquestioned; these
items may be considered by the [court] without converting the motion into one for
summary judgment.

22 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1357 (3rd
23 ed. 2004). See, e.g., United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“A court
24 may . . . consider certain materials—documents attached to the complaint, documents
25 incorporated by reference in the complaint, or matters of judicial notice—without converting the
26 motion to dismiss into a motion for summary judgment.”); Sears, Roebuck & Co. v.
27

1 Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir. 1956) (“[J]udicial notice may be taken of
2 a fact to show that a complaint does not state a cause of action.”); Branch v. Tunnell, 14 F.3d
3 449, 454 (9th Cir. 1994) (“[W]e hold that documents whose contents are alleged in the complaint
4 and whose authenticity no party questions, but which are not physically attached to the pleading,
5 may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”), cert. denied, 512 U.S. 1219
6 (1994); Barapind v. Reno, 72 F. Supp. 2d 1132, 1141 (E.D. Cal. 1999) (“Matters of public record
7 may be considered, including pleadings, orders, and other papers filed with the court or records
8 of administrative bodies.”); Roe v. Unocal Corp., 70 F. Supp. 2d 1073, 1075 (C.D. Cal. 1999)
9 (“[E]ven if a document is neither submitted with the complaint nor explicitly referred to in the
10 complaint, the . . . court may consider the document in ruling on a motion to dismiss so long as
11 the complaint necessarily relies on the document and the document’s authenticity is not
12 contested.”).

13 B. Fraudulent Transfers & Obligations

14 1. Elements of the Liquidating Trustee’s § 548(a)(1) Claims.

15 Section 548(a)(1) authorizes a trustee to avoid any transfer of the debtor's interest in
16 property if the transfer was the result of actual or constructive fraud. See 11 U.S.C. § 548(a)(1)
17 (2012). Section 548(a)(1)(A) focuses on actual fraud and permits a trustee to avoid any transfer
18 or obligation made or incurred “with actual intent to hinder, delay, or defraud any entity to which
19 the debtor was or became . . . indebted.” Id. § 548(a)(1)(A). Section 548(a)(1)(B), on the other
20 hand, governs constructive fraud. See id. § 548(a)(1)(B). To state a claim under § 548(a)(1)(B),
21 the Liquidating Trustee must allege three elements: (1) that a transfer was made within two years
22 of the petition date; (2) that the debtor received less than reasonably equivalent value in
23 exchange for the transfer; and (3) that either the debtor (a) was insolvent on the date of the
24 transfer or became insolvent as a result of the transfer; (b) was engaged in business or a
25 transaction, or was about to engage in business or a transaction, for which any property
26 remaining with the debtor was an unreasonably small capital; or (c) intended to incur, or believed
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would incur, debts beyond the debtor's ability to pay as such debts matured. *Id.*; see *Emerald Capital Advisors, Corp. v. Bayerische Motoren Werke Aktiengesellschaft (In re FAH Liquidating Corp.)*, 572 B.R. 117, 126 (Bankr. D. Del. 2017). Whether the transfer or obligation resulted from actual and constructive fraud, a trustee cannot challenge transfers that occurred more than two years before the filing of the bankruptcy petition even if all of the other elements of a fraudulent transfer claim are satisfied. See 11 U.S.C. § 548(a)(1). Section 550(a) provides that a trustee "may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee." *Id.* § 550(a).

2. Elements of the Liquidating Trustee's Section 544(b) Claims.

Under § 544(b) a trustee succeeds to the rights of an unsecured creditor to avoid a transaction under non-bankruptcy law. See 11 U.S.C. § 544(b). "If an actual, unsecured creditor can, on the date of the bankruptcy, reach property that the debtor has transferred to a third party, the trustee may use § 544(b) to step into the shoes of that creditor and 'avoid' the debtor's transfer." *Cadle Co. v. Moore (In re Moore)*, 608 F.3d 253, 260 (5th Cir. 2010). The Liquidating Trustee's rights under § 544(b) arise under federal law, but the scope of those rights is defined by non-bankruptcy law. *Id.*

Under California law, a transfer made "[w]ith the actual intent to hinder, delay, or defraud any creditor of the debtor" violates California's Uniform Fraudulent Transfer Act ("CUFTA"). Cal. Civ. Code § 3439.04(a)(1); see *Mejia v. Reed*, 31 Cal. 4th 657, 664 (2003). To prevail under section 3439.04(a)(1), the Liquidating Trustee must establish by a preponderance of the evidence that CTG made each of the targeted transfers with the actual intent to hinder, delay or defraud a creditor. See *Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 235 (B.A.P. 9th Cir. 2007) ("Whether there is actual intent to hinder, delay, or defraud

under UFTA is a question of fact to be determined by a preponderance of evidence.”). “Since direct evidence of intent to hinder, delay or defraud is uncommon, the determination typically is made inferentially from circumstances consistent with the requisite intent.” Beverly, 374 B.R. at 235. The CUFTA identifies 11 non-exclusive factors, or “badges of fraud,” that may be applied by a court to divine fraudulent intent:

1. Whether the transfer or obligation was to an insider.
2. Whether the debtor retained possession or control of the property after the transfer.
3. Whether the transfer or obligation was disclosed or concealed.
4. Whether the debtor was sued or threatened with suit before the transfer was made or obligation incurred.
5. Whether the transfer was of substantially all of the debtor’s assets.
6. Whether the debtor absconded.
7. Whether the debtor removed or concealed assets.
8. Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or obligation incurred.
9. Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation incurred.
10. Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
11. Whether the debtor transferred essential assets of the business to a lienholder who then transferred the assets to an insider of the debtor.

Cal. Civ. Code § 3439.04(b). The CUFTA factors are intended “to provide guidance to the trial court, not compel a finding one way or another.” Filip v. Bucurenciu, 129 Cal. App. 4th 825, 834 (2005).

1 The elements of a constructive fraud under CUFTA are nearly identical to the elements
2 required to state a claim for constructive fraud under § 548(a)(1)B, except that CUFTA extends
3 the lookback period such that a cause of action must be brought within four years after the
4 transfer was made. See Cal. Civ. Code § 3439.04(a)(2)(A). Constructive fraud may be found
5 under California law as to any present or future creditor when a debtor does not receive a
6 reasonably equivalent value in exchange for a transfer, and either

7 (A) Was engaged or was about to engage in a business or a transaction for which
8 the remaining assets of the debtor were unreasonably small in relation to the
business or transaction, [or]

9 (B) Intended to incur, or believed or reasonably should have believed that the
10 debtor would incur, debts beyond the debtor's ability to pay as they became due.

11 Cal. Civ. Code § 3439.04(a)(2). Similarly, constructive fraud can be found under California
12 Civil Code section 3439.05, "as to an existing creditor if the debtor does not receive reasonably
13 equivalent value and 'was insolvent at that time or . . . became insolvent as a result of the
14 transfer.'" Mejia, 31 Cal. 4th at 670, (quoting Cal. Civ. Code § 3439.05).

15 C. Elements of the Liquidating Trustee's Alter Ego Theory.

16 The Liquidating Trustee may assert an alter ego claim in conjunction with an action to
17 recover assets of the estate, including an action for conversion or to set aside a fraudulent
18 transfer. See Ahcom, Ltd. v. Smedling, 623 F.3d 1248, 1252 (9th Cir. 2010). "The alter ego
19 doctrine arises when a plaintiff comes into court claiming that an opposing party is using the
20 corporate form unjustly and in derogation of the plaintiff's interests. In certain circumstances,
21 the court will disregard the corporate entity and will hold the individual shareholders liable for
22 the actions of the corporation." Neilson, 290 F. Supp. 2d at 1115 (quoting Mesler v. Bragg
23 Mgm't Co., 39 Cal. 3d 290, 300 (1985)). "Before the doctrine may be invoked, two elements
24 must be alleged: 'First, there must be such a unity of interest and ownership between the
25 corporation and its equitable owner that the separate personalities of the corporation and the
26 shareholder do not in reality exist. Second, there must be an inequitable result if the acts in

question are treated as those of the corporation alone.”” Neilson, 290 F. Supp. 2d at 1115 (quoting Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 526 (2000)). “Alter ego has been described as ‘an extreme remedy, sparingly used.’” Leslie v. Bartamian (In re Mihranian), 2017 WL 2775043, *6 (B.A.P. 9th Cir. 2017) (quoting Sonora Diamond Corp., 83 Cal. App. 4th at 539).

D. The Complaint Fails to State a Plausible Alter Ego Claim.

In the first paragraph of the Complaint, the Liquidating Trustee lumps together Blue Wolf Capital Partners, LLC, BWC, Gladstone Investment Corporation, Blue Wolf Capital Advisors L.P., and BW Piezo as the “Blue Wolf Entities.”⁸ The Liquidating Trustee goes on to claim that CTG, CTGAM, and each of the Blue Wolf Entities are alter egos of one other. The facts alleged in the Complaint, however, focus primarily on the operations of BW Piezo, CTG and CTGAM. For example, the Liquidating Trustee alleges:

32. Blue Wolf surreptitiously decided to segregate the companies on paper. Blue Wolf created a new entity named CTG Advanced Materials to hold the H.C. Materials assets, and Blue Wolf structured CTG Advanced Materials to be a sister company to CTG under the ownership of BW Piezo instead of as a wholly-owned subsidiary of CTG as it represented to the public and CTG’s creditors.

33. The segregation was fictional. Blue Wolf directed Mr. Phillips to run CTG Advanced Materials as a division of CTG, and the companies, along with BW Piezo, were operated as a single enterprise. As detailed below, BW Piezo, CTG, and CTG Advanced Materials commingled assets and assets of the companies. Blue Wolf indiscriminately directed CTG to transfer funds to pay for CTG Advanced Materials liabilities, including payroll, professional services, and legal bills, and vice versa. CTG also guaranteed loans for CTG Advanced Materials’s benefit and the assets of each company were treated as one in the same. Further, all entities used the same business locations and employees, shared the same control group, and shared corporate records. Moreover, CTG and CTG Advanced Materials were held out publicly to be the same entity, and CTG even represented to the federal government that CTG had acquired H.C. Materials and was its successor legal entity.

...

⁸ Complaint, at 2:3-5.

1 43. Blue Wolf's use of CTG and CTG Advanced Materials was a sham to
2 perpetrate a fraud. Blue Wolf used BW Piezo, CTG, and CTG Advanced
3 Materials to manipulate the assets and liabilities between the entities. Blue Wolf
4 abused the corporate form by segregating the shared assets and liabilities in the
separate entities with the intent to avoid performance by relying on the corporate
form as a shield.

5 44. In addition, and in the alternative, BW Piezo, CTG, and CTG Advanced
6 Materials were organized and operated as a single business enterprise. Although
7 Blue Wolf identified CTG and CTG Advanced Materials as separate entities in
company organizational charts, in practice, there was no corporate separateness of
8 the two (or BW Piezo). Blue Wolf – utilizing its "shell company" BW Piezo –
routinely commingled funds and assets between the two to cover company
liabilities . . .⁹

9
10 The Liquidating Trustee fails to allege facts to show that any of the Blue Wolf Entities are alter
11 egos of each other. While the allegations of paragraphs 32, 33, 43 and 44 when read in
12 conjunction with other facts alleged in the Complaint might satisfy the first element of an alter
13 ego claim against BW Piezo, CTG and CTGAM, they fail to satisfy the first element of a
14 plausible alter ego claim against Blue Wolf Capital Partners, LLC, BWCF, Blue Wolf Capital
15 Advisors, L.P. and Gladstone Investment Corporation.

16 The Liquidating Trustee's allegations with respect to the second element of its alter ego
17 claim suffer from the same infirmities. Without further facts to show that the failure to treat
18 CTG, CTGAM, and each of the Blue Wolf Entities as alter egos of one other would lead to an
inequitable result, there is insufficient factual content in the Complaint to support the Liquidating
19 Trustee's conclusory statement in paragraph 21 that "[a]dherence to the fiction of the separate
20 existence of the Blue Wolf Entities and CTG from one another would permit an abuse of the
21 corporate privilege, would sanction fraud, and promote injustice."¹⁰ Paragraph 21 does not even
22 mention CTGAM.

23 "Conclusory allegations of 'alter ego' status are insufficient to state a claim. Rather, a
24 plaintiff must allege specifically both of the elements of alter ego liability, as well as facts

25
26 ⁹ Id. at 8:21-9:12; 12:12-24.

27 ¹⁰ Id. at 6:4-6.

1 supporting each.” Neilson, 290 F. Supp. 2d at 1116; see Miranian, 2017 WL 2775043, *6
2 (“There is no single set of underlying facts that always must be alleged to plausibly demonstrate
3 these two criteria; instead, a variety of case-specific facts must be considered to establish the
4 principal’s domination and control over the corporation and to show that immunizing the
5 principal from the corporation’s liability would work an injustice.”). “California courts have
6 rejected the view that the potential difficulty a plaintiff faces collecting a judgment is an
7 inequitable result that warrants application of the alter ego doctrine.” Neilson, 290 F. Supp. 2d at
8 1117. “Rather, California courts generally require some evidence of bad faith conduct on the
9 part of the defendants before concluding that an inequitable result justifies an alter ego finding.”
10 Id.

11 In sum, the allegations of the Complaint fail to state a plausible alter ego claim against
12 any of the Blue Wolf Entities, CTG or CTGAM.

13 E. Part VI. A & C of the Complaint Fail to State a Plausible Claim for Avoidance and Recovery
14 of an Actual Fraudulent Transfer.

15 In its first claim for relief, the Liquidating Trustee seeks avoidance of certain transfers
16 allegedly fraudulent under § 548(a)(1)(A) and recoverable under § 550. The Liquidating Trustee
17 alleges, in pertinent part:

18 30. After hiring Mr. Philips, Blue Wolf continued to negotiate with Mr. Han
19 regarding the acquisition of H.C. Materials. To obtain a loan to purchase H.C.
20 Materials, Blue Wolf represented to lenders that CTG was purchasing H.C.
21 Materials as a wholly-owned subsidiary. Blue Wolf mortgaged CTG’s assets,
22 forced CTG to guarantee the significant loan, and directed CTG to contribute its
23 own cash assets for the purchase of H.C. Materials. Blue Wolf’s actions left CTG
24 saddled with significant debt and limited CTG’s business.

25 31. On or about October 2013, Blue Wolf used the loan proceeds and CTG’s cash
26 to acquire H.C. Material’s assets for \$48 million

27 39. On or about March 2016, Blue Wolf sold CTG Advanced Materials for
approximately \$73 million. Instead of returning to CTG the proceeds from the
sale of assets of CTG Advanced Materials, Blue Wolf structured the transaction to
have the purchaser, CTS Corporation, transfer the proceeds to the Blue Wolf
Entities, CIT Bank, N.A., the Mezzanine Lenders, Pengdi Han, and to the Blue

1 Wolf Entities' insiders as bonus payments. The transfers related to the sale of
2 CTG Advanced Materials are described in further detail in the attached Exhibit
A.

3 ...
4
5 50. Upon information and belief, each of the transfers specified in Exhibit A
6 were made with property of CTG. Specifically, the proceeds from the sale of
7 CTG Advanced Materials belonged to CTG.
8

9
10 51. In addition, the Blue Wolf Entities forced CTG to enter into a Loan and
11 Security Agreement, dated April 20, 2016, with Blue Wolf Capital Fund II, L.P.
12 As part of the Loan and Security Agreement, CTG became liable for a line of
13 credit of \$2.86 million in exchange for security interests and liens over
14 substantially all of CTG's personal property.
15

16
17 52. Upon information and belief, each of the transfers or obligations were made
18 or entered into after October 14, 2014.
19

20
21 53. Blue Wolf, through its officers, employees, and agents made the transfers and
22 incurred the obligations specified in Exhibit A with the actual intent to hinder,
23 delay, and defraud CTG's creditors.
24

25
26 54. Each transfer or obligation incurred was made, or entered into, in furtherance
27 of the scheme perpetrated by the Blue Wolf Entities. By causing such transfers to
be made, the Blue Wolf Entities hoped to distribute to themselves the proceeds
from a sale of CTG Advanced Materials.
28

29
30 55. At the time the transfers and obligations incurred were made, or entered into,
31 the Blue Wolf Entities understood that causing those transfers and incurring those
32 obligations would inevitably harm CTG's creditors. The Blue Wolf Entities knew
33 CTG would be left insolvent and the transfers would reduce the amount of funds
available to repay creditors.
34

35
36 56. The Blue Wolf Entities held an ownership interest in CTG and exercised
37 complete control over CTG and CTG Advanced Materials. The Blue Wolf
38 Entities controlled the transfer of funds, the ability for CTG to incur obligations,
39 and the ability to direct those purchasing CTG's assets to transfer the proceeds
40 from their sale.
41

42
43 57. The transfers were received by the beneficiaries as specified in Exhibit A.
44

45
46 58. Plaintiff may avoid each of the transfers and obligations under 11 U.S.C.
47 §§ 548(a)(1)(A) and 550.¹¹
48

49
50 ¹¹ Id. at 8:10-18; 11:14-20; 15:1-16:11 (emphasis added).
51

1 The Liquidating Trustee makes nearly identical allegations in its third claim for relief seeking
2 avoidance of the transfers listed in Exhibit A on the grounds of actual fraud pursuant to 11
3 U.S.C. § 544 and CUFTA.¹²

4 First, to state a plausible claim for avoidance of a transfer based on actual fraud, the
5 debtor must have possessed an interest in the property transferred. 11 U.S.C. § 548(a)(1). The
6 Liquidating Trustee's first and third claims hinge on an alter ego theory of recovery. Absent
7 such a finding, CTG had no interest in the subject property allegedly transferred to the entities
8 identified in Exhibit A. As previously stated, the Complaint fails to state a plausible alter ego
9 claim against CTG, CTGAM or any of the Blue Wolf Entities. Consequently, the Liquidating
10 Trustee's fraudulent transfer claims under an alter ego theory of liability must fail as well.

11 Second, Exhibit A contains a summary of dates, amounts and entities who purportedly
12 received such amounts. Neither the Complaint nor Exhibit A reveal the specific date, amount,
13 source, and transferee of each transfer sought to be avoided, other than to claim that “[t]he
14 transfers related to the sale of CTG Advanced Materials.”¹³ The statements in paragraphs 50, 52,
15 70 and 72 are made “[u]pon information and belief,” but there are few facts alleged in
16 paragraphs 50, 52, 70 or 72 to establish the basis for such belief to meet the particularity
17 requirement of Rule 9(b). Paragraphs 30 and 31 of the Complaint are devoid of facts regarding
18 the purchase of H.C. Materials in October 2013, the specific parties to the transaction, and the
19 role of CIT Bank, N.A. and the Mezzanine Defendants in financing the transaction. Nowhere in
20 paragraph 39 or Exhibit A does the Liquidating Trustee disclose that the alleged transfers
21 summarized in Exhibit A allegedly associated with the sale of CTGAM involved, at least in part,
22 payments on loans by CIT Bank, N.A. and the Mezzanine Defendants secured by liens on the
23 assets of CTGAM.

24
25

¹² Id. at 17:15-18:22.

26 ¹³ Id. at 11:19-20.

1 Rule 9(b) demands specificity regarding the date, amount, source and transferee of each
2 transfer currently summarized in Exhibit A. Only then will each of the defendants alleged to
3 have received the transfers summarized in Exhibit A receive proper notice of the specific transfer
4 or transfers sought to be avoided and be in a position to evaluate whether one or more of the
5 claims asserted by the Liquidating Trustee are barred by limitations.

6 Finally, the Liquidating Trustee asserts that the transfers listed in Exhibit A were made
7 pursuant to a scheme hatched by the Blue Wolf Entities “with the actual intent to hinder, delay,
8 and defraud CTG’s creditors.”¹⁴ The Liquidating Trustee charges that the Blue Wolf Entities
9 authorized the transfers and had the requisite fraudulent intent, but the fails to allege any facts
10 regarding the particular wrongful conduct of any one of the five entities. “Rule 9(b) does not
11 allow a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to
12 differentiate their allegations when suing more than one defendant . . . and inform each defendant
13 separately of the allegations surrounding his alleged participation in the fraud.’” Swartz, 476
14 F.3d at 764-65 (quoting Haskin v. R.J. Reynolds Tobacco Co., 995 F. Supp. 1437, 1439 (M.D.
15 Fla. 1998)). The Liquidating Trustee “must, at a minimum, ‘identif[y] the role of [each]
16 defendant[] in the alleged fraudulent scheme.’” Id. at 765 (alteration in original) (quoting Moore
v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)). Without stating any
17 factual basis with respect to the alleged participation of each of the Blue Wolf Entities in the
18 scheme, the Liquidating Trustee’s allegation of a scheme perpetrated by the Blue Wolf Entities
19 involving the transfers and obligations summarized in Exhibit A as having been made or incurred
20 “with the actual intent to hinder, delay, and defraud CTG’s creditors” is conclusory and
21 insufficient as a matter of law.¹⁵

23
24 ¹⁴ Id. at 15:20-21.

25 The Mezzanine Defendants argue that “[r]epayment of fully secured obligations – where a
26 transfer results in a dollar for dollar reduction of the debtor’s liability – do not hinder, delay, or
27 defraud creditors because the transfers do not put assets otherwise available in a bankruptcy
distribution out of their reach.” Mezzanine Defendants’ Motion, at 6:19-23 (citing In re First
Alliance Mortg. Co., 471 F.3d 977, 1008 (9th Cir. 2006)). The Liquidating Trustee challenges

1 F. Part VI. B & D of the Complaint Fail to State a Plausible Claim for Avoidance and Recovery
2 of a Constructively Fraudulent Transfer.

3 In its second and fourth claims for relief, the Liquidating Trustee points again to Exhibit
4 A and asserts that the transfers summarized therein are avoidable under § 548(a)(1)(B), or
5 alternatively, § 544(b) and CUFTA, as constructively fraudulent. With respect to its second
6 claim for relief under § 548(a)(1)(B), the Liquidating Trustee asserts, in pertinent part, that:

7 63. CTG did not receive reasonably equivalent value in exchange for the property
8 transferred.

9 64. As a result of the transfers or obligations, CTG became insolvent and
10 undercapitalized.

11 65. Additionally, and in the alternative, the Blue Wolf Entities intended and knew
12 that the obligations CTG incurred were beyond its ability to pay as the debts
matured.

13 66. The Blue Wolf Entities held an ownership interest in CTG and exercised
14 complete control over CTG and CTG Advanced Materials. The Blue Wolf
15 Entities controlled the transfer of funds, the ability of CTG to incur obligations,
and the ability to direct those purchasing CTG's assets to transfer the proceeds
from their sale.

16 67. The transfers were received by the beneficiaries specified in Exhibit A.¹⁶

17 Similar allegations are made by the Liquidating Trustee with respect to its constructive
18 fraudulent transfer claim under § 544 and CUFTA.¹⁷

19
20 the Mezzanine Defendants' loan transaction, claiming that "CTG did not receive any value from
making loan payments to the Mezzanine [Defendants] for the benefit of CTG Advanced
21 Materials." Plaintiff's Response in Opposition to Defendants Fidus Investment Corporation,
Fidus Mezzanine Capital II, L.P., Avante Mezzanine Partners SBIC, LP, Avante Mezzanine
22 Partners II, Inc.'s Motion to Dismiss First Amended Complaint [Docket No. 123] filed Mar. 4,
2019, at 20:12-13. The court notes that First Alliance Mortgage involved an appeal following a
23 jury trial of a liquidating trustee's claims, including the avoidance of alleged fraudulent transfers.
First Alliance Mortg., 471 F.3d at 983-84. While repayment of a fully secured loan pursuant to a
24 valid financing agreement, of and by itself, may not be fraudulent, the court is reluctant to
dismiss as to the Mezzanine Defendants on such ground at this early point in the pleading stage.

25 ¹⁶ Id. at 17:1-12.

26
27 ¹⁷ Id. at 19:13-25.

1 The Liquidating Trustee's second and fourth claims hinge on an alter ego theory of
2 recovery. As previously stated, the Complaint fails to state a plausible alter ego claim against
3 CTG, CTGAM or any of the Blue Wolf Entities. Because the Liquidating Trustee cannot
4 establish the transfer of an interest in property of the debtor absent a properly pled alter ego
5 theory, the Liquidating Trustee's constructive fraudulent transfer claims under an alter ego
6 theory of liability must fail. Furthermore, to state a claim under § 544(b)(1), the complaint must
7 specifically allege the identity of an actual unsecured creditor who would have standing to
8 challenge the transfer. See Neilson, 290 F. Supp. 2d at 1147-48 ("[T]he court grants Imperial's
9 motion to dismiss Neilson's fraudulent transfer claim to the extent it relies on the existence of
10 unidentified unsecured creditors who could avoid the transfers under state law in the absence of
11 the bankruptcy proceeding."). The Complaint does not identify such a creditor. For these
12 reasons alone, the Liquidating Trustee's second and fourth claims for relief fail to satisfy Rule
13 12(b)(6).

14

15 G. Part VI. E & G of the Complaint Fail to State a Plausible Claim for Avoidance and Recovery
16 of an Actual Fraudulent Transfer.

17 In its fifth claim for relief, the Liquidating Trustee seeks avoidance of certain transfers
18 allegedly fraudulent under § 548(a)(1)(A) and recoverable under § 550. The Liquidating Trustee
19 alleges, in pertinent part:

20 89. Upon information and belief, each of the transfers specified in **Exhibit B**
21 were made with property of CTG.

22 90. Upon information and belief, each of the transfers or obligations were made
23 or entered into after October 14, 2014.

24 91. CTG, through its officers, employees, and agents made the transfers and
25 incurred the obligations specified in Exhibit B with the actual intent to hinder,
delay, and defraud CTG's creditors.

26 92. Each transfer or obligation incurred was made, or entered into, in furtherance
27 of a scheme perpetrated by CTG's management and controlling shareholder. By

1 causing such transfers to be made, CTG's management and controlling
2 shareholder hoped to enrich themselves from the eventual sale or dissolution of
3 CTG, CTG Advanced Materials, LLC, and Electro Optical Industries.

4 93. At the time the transfers and obligations incurred were made, or entered into,
5 CTG's management and controlling shareholder understood that causing those
6 transfers and incurring those obligations would inevitably harm CTG's creditors.
7 CTG's management and controlling shareholder knew CTG would be left
8 insolvent and the transfers would reduce the amount of funds available to repay
9 creditors.

10 94. CTG's management and controlling shareholder held an ownership interest in
11 CTG and/or exercised complete control over CTG. CTG's management and
12 controlling shareholder controlled the transfer of funds, the ability of CTG to
13 incur obligations, and the ability to direct those purchasing CTG's assets to
14 transfer the proceeds from their sale.

15 95. The transfers were received by the beneficiaries as specified in **Exhibit B**.¹⁸

16 The Liquidating Trustee makes nearly identical allegations in its seventh claim for relief,
17 asserting that the transfers or obligations listed in **Exhibit B** "were made or entered into after
18 October 12, 2014, or within one year of Plaintiff's discovery of the same" and are avoidable
19 pursuant to § 544(b) on the grounds of actual fraud under CUFTA.¹⁹

20 The Liquidating Trustee's allegation that the transfers, as a whole, were part of a scheme
21 by CTG's management and controlling shareholder to hinder, delay, and defraud CTG's
22 creditors falls short of stating a plausible claim for relief under either § 548(a)(1)(A) or § 544(b)
23 and CUFTA. "[T]he who, what, when, where and how" of the Liquidating Trustee's fifth and
24 seventh claims for relief are tucked in Exhibit B which falls woefully short of satisfying Rule 9's
25 particularity requirement for allegations of actual fraud. Exhibit B merely identifies the alleged
26 recipient of a total amount of funds over a period of years and the alleged recipient or recipients
27 of one or more of the transfers. For example, Grant Thornton is alleged in Exhibit B to have

¹⁸ Id. at 20:1-21:5 (emphasis added).

¹⁹ Id. at 22:9-23:14. The only difference in the factual allegations between the two causes of action is the date of the alleged transfers or obligations sought to be avoided.

1 received \$1,105,115.85 in transfers between January 25, 2013 and March 15, 2017, the
2 beneficiary of which is alleged to be “Blue Wolf Entities; CTG Advanced Materials, LLC.”
3 Neither the Complaint or Exhibit B identify specific date, amount, source, and transferee of each
4 transfer sought to be avoided.

5 Rule 9(b) demands specificity regarding the date, amount, source and transferee of each
6 transfer currently summarized in Exhibit B. Only then will each of the defendants alleged to
7 have received one or more of the transfers summarized in Exhibit B receive proper notice of the
8 specific transfer or transfers sought to be avoided and be in a position to evaluate whether one or
9 more of the claims are barred by limitations. Without such material information, there are few
10 facts regarding the targeted transfers from which an inference of an actual intent to hinder, delay
11 or defraud can be drawn. Because the date and amount of each transfer forming the total is not
12 disclosed, the court cannot determine which, if any, of the alleged transfers in Exhibit B precede
13 the operative dates contained in paragraphs 90 and 110 of the Complaint, respectively, the
14 avoidance and recovery of which may be barred by limitations. The statements in paragraphs 89,
15 90, 109 and 110 are made “[u]pon information and belief,” but there are few facts alleged in
16 paragraphs 89, 90, 109 or 110 to establish the basis for such belief to satisfy the particularity
17 requirement of Rule 9(b). The allegations of paragraph 91, when read in conjunction with
18 paragraphs 92-94 and other facts disclosed in the Complaint, amount to a legal conclusion that
19 does not survive a Rule 12(b)(6) motion. Likewise, the allegations of paragraph 111, coupled
20 with the reasoning contained in paragraphs 112-114, falls short of containing sufficient factual
21 content to permit the court to draw the reasonable conclusion that the defendants are liable for
22 the misconduct alleged.

23 For these reasons, the Liquidating Trustee’s fifth and seventh causes of action to avoid
24 and recover actual fraudulent transfers must be dismissed for failure to state a claim upon which
25 relief can be granted.

26
27

1 H. Part VI. F & N of the Complaint Fail to State a Plausible Claim for Avoidance and Recovery
2 of a Constructively Fraudulent Transfer.

3 Courts do not generally apply the heightened pleading standard of Rule 9(b) to
4 constructive fraud claims. 1849 Condominiums Assoc., Inc. v. Bruner, 2010 WL 2557711, *3
5 (E.D. Cal. 2010), citing Cendant Corp. v. Shelton, 474 F. Supp. 2d 377, 380 (D. Conn. 2007).
6 Rule 9(b) is inapplicable because constructive fraud claims “are not based on actual fraud but
7 instead rely on the debtor’s financial condition and the sufficiency of the consideration provided
8 by the transferee.” Angell v. Ber Care, Inc., et al. (In re Careamerica, Inc.), 409 B.R. 737, 755
9 (Bankr. E.D.N.C. 2009). Still, a constructive fraud claim must satisfy Rule 8(a) and contain
10 sufficient facts to establish that the claim is plausible.

11 “The Trustee must do more than simply recite statutory elements, but he need only state
12 facts with sufficient particularity to provide the defendant fair notice of the charges against him.”
13 Stanziale v. Brown-Minneapolis Tank ULC, LLC (In re BMT-NW Acquisition, LLC), 582 B.R.
14 846, 856 (Bankr. D. Del. 2018). “[C]omplaints simply identifying the dates, amounts, source,
15 and the transferee of each of the alleged transfers successfully support claims for constructive
16 fraudulent transfer under the pleading standard of Rule 8(a)(2).” Id. “Determining ‘reasonably
17 equivalent value’ and ‘insolvency,’ with respect to the second and third elements of constructive
18 fraud, requires factual determinations discouraging a motion to dismiss while encouraging
19 testing in the discovery process.” Id. at 857. “Disputes as to the actual value given in exchange
20 for the transfer do not need to be decided on a motion to dismiss, so long as ‘the Trustee has
21 identified the transfer by date and face amount and has alleged that it was for no consideration.’”
22 Id. (quoting In re FAH Liquidating Corp., 572 B.R. 117, 127 (Bankr. D. Del. 2017)).

23 In its sixth and eighth claims for relief, the Liquidating Trustee points again to Exhibit B
24 and asserts that the transfers summarized therein are avoidable under § 548(a)(1)(B), or
25 alternatively, § 544(b) and CUFTA, as constructively fraudulent. The Liquidating Trustee’s
26 constructive fraud claims are insufficiently stated and must be dismissed. The Liquidating
27

1 Trustee asserts that “CTG did not receive reasonably equivalent value in exchange for the
2 property transferred,” “became insolvent and undercapitalized” by virtue of the transfers, and
3 “knew that the obligations CTG incurred were beyond its ability to pay as the debts matured.”²⁰
4 However, the Complaint and Exhibit B lack material information regarding the specific date,
5 amount, source, and transferee of each of the transfers sought to be avoided. Without such facts
6 the Liquidating Trustee’s recitation of the statutory elements falls short of stating a plausible
7 claim. Moreover, the court is unable to determine whether the targeted transfers were made
8 within the applicable limitations period. Finally, the Liquidating Trustee’s claim under
9 § 544(b)(1) fails to specifically identify an actual unsecured creditor who would have standing to
10 challenge the transfer. See Neilson, 290 F. Supp. 2d at 1147-48. As previously stated, the
11 Complaint does not identify such a creditor.

12 Accordingly, the Liquidating Trustee’s sixth and eighth causes of action to avoid and
13 recover constructive fraudulent transfers must be dismissed for failure to state a claim upon
14 which relief can be granted.

15 I. Part VI. I of the Complaint Fails to State a Plausible Claim for Unjust Enrichment.

16 California courts differ on the issue of whether there is an independent cause of action in
17 California for unjust enrichment. Compare Melchior v. New Line Prods., Inc., 106 Cal. App. 4th
18 779, 793 (2003) (“[T]here is no cause of action in California for unjust enrichment.”) with
19 Prakashpalan v. Engstrom, Lipscomb & Lack, 223 Cal. App. 4th 1105, 1132 (2014) (“The
20 elements for a claim of unjust enrichment are ‘receipt of a benefit and unjust retention of the
21 benefit at the expense of another.’” (citation omitted)). “While California case law appears
22 unsettled on the availability of such a cause of action, [the Ninth] Circuit has construed the
23 common law to allow an unjust enrichment cause of action through quasi-contract.” ESG
24 Capital Partners, LP v. Stratos, 828 F.3d 1023, 1038 (9th Cir. 2016). Unjust enrichment and
25 restitution “describe the theory underlying a claim that a defendant has been unjustly conferred a

26
27 ²⁰ Id. at 21:21-22:1.

1 benefit ‘through mistake, fraud, coercion, or request.’” Astiana v. Hain Celestial Grp., Inc., 783
2 F.3d 753, 762 (9th Cir. 2015) (citation omitted). “When a plaintiff alleges unjust enrichment, a
3 court may ‘construe the cause of action as a quasi-contract claim seeking restitution.’” Id.
4 (citation omitted).

5 “To allege unjust enrichment as an independent cause of action, a plaintiff must show
6 that the defendant received and unjustly retained a benefit at the plaintiff’s expense.” Capital
7 Partners, 828 F.3d at 1038. With respect to unjust enrichment, the Complaint states:

8 126. Defendants received the following benefits:

- 9 • Proceeds of sale of Electro-Optical Industries, Inc.;
- 10 • Proceeds of sale of CTG Advanced Material to BW Piezo, and,
11 subsequently to other Blue Wolf Entities; and
- 12 • CTG’s capital to Blue Wolf Entities, including Blue Wolf Capital
13 Fund II, L.P. in connection with the Prepetition Credit Agreement.
- 14 • In the alternative, in the event an alter ego determination is not made,
15 Defendants Grant Thornton, LLP, CTG Advanced Materials, LLC,
16 CTS Corporation, Electro Optical Industries received transfers from
17 CTG or benefits from CTG paying its liabilities.

18 127. Defendants’ continued retention of these benefits is unjust.

19 128. Defendants acquired these benefits by coercion and abuse of control.²¹

20 The Liquidating Trustee’s unjust enrichment claim must be dismissed. First, the
21 Liquidating Trustee claims in response to the Grant Thornton Motion and the Blue Wolf Entities
22 Motion that its unjust enrichment claim is pled as an alternative claim for relief.²² However, the
23 Liquidating Trustee’s assertion is belied by the allegations of the Complaint. Nowhere in the
24 Complaint does the Liquidating Trustee state that its unjust enrichment claim is pled in the

25 ²¹ Id. at 24:19-25:5.

26 ²² Response to Grant Thornton LLP’s Amended Motion to Dismiss (Docket No. 62) filed Jan. 2,
27 2019, at 9:14-18; Response to Defendants Blue Wolf Capital Partners, LLC, Blue Wolf Capital
Fund II, LP, Blue Wolf Capital Advisors LP, and BW Piezo Holdings, LLC’s Motion to Dismiss
First Amended Complaint (Docket No. 122) filed Mar. 4, 2019, at 24:3-6.

1 alternative in the event the Liquidating Trustee is unsuccessful on its claims to avoid alleged
2 fraudulent transfers. Second, because the Complaint fails to state a plausible alter ego claim
3 against any of the Defendants, the Liquidating Trustee's unjust enrichment claim based upon an
4 alter ego theory of liability must also fail. Third, Rule 9(b) requires that the circumstances of an
5 alleged fraud be stated with particularity. See, e.g., Vess, 317 F.3d at 1103-04 (Where "the
6 claim is said to be 'grounded in fraud' or to 'sound in fraud,' . . . the pleading of that claim as a
7 whole must satisfy the particularity requirement of Rule 9(b)."); Maksoud v. Guelton, 2017 WL
8 2505887, at *6 (S.D. Cal. 2017) ("Plaintiff's restitution claim is grounded in fraud and he has
9 failed to plead the facts with sufficient particularity."). To the extent that the Liquidating
10 Trustee's unjust enrichment claim is grounded in fraud, the Liquidating Trustee has failed to
11 state with particularity the circumstances of the alleged fraud. To the extent that the Liquidating
12 Trustee's unjust enrichment claim is not grounded in fraud, the Liquidating Trustee has failed to
13 plead sufficient facts to show that any of the Defendants received a transfer of CTG's property,
14 i.e., the specific date, amount, source and transferee of each of the "benefits" discussed in
15 paragraph 126 of the Complaint. Nor has the Liquidating Trustee alleged sufficient factual
16 content to show that any of the Defendants acquired one or more of the alleged benefits by fraud,
17 coercion, or an abuse of control. Under the circumstances, the allegations of paragraphs 127 and
18 128 are simply legal conclusions devoid of any specific facts to state a plausible claim for relief.

19 Finally, the Blue Wolf Entities argue persuasively that the Liquidating Trustee cannot
20 maintain an unjust enrichment claim as a matter of law because such a cause of action is
21 displaced by the Liquidating Trustee's fraudulent transfer claims, citing Attebury Grain LLC v.
22 Grayn Co., 721 F. App'x. 669 (9th Cir. 2018). In Attebury Grain the Ninth Circuit affirmed the
23 district court's order granting summary judgment on the plaintiff's claims of intentional and
24 constructive fraudulent transfers.²³ In so holding the court stated that "the district court erred by

25
26
27 ²³ Attebury Grain, 721 F. App'x. at 671.

1 granting summary judgment for Attebury on its legally deficient unjust enrichment claim[,]”
2 stating:

3 Attebury [cannot] bring an unjust enrichment claim against Cortez or Grayn for
4 their receipt of Superior’s assets without having given adequate payment. This
5 theory describes a viable fraudulent transfer claim, which displaces an unjust
6 enrichment cause of action. Unjust enrichment is a valuable basis for a claim to
7 “fill in the cracks” where other causes of action fail to achieve justice, but because
8 the fraudulent transfer claim could be presented here, and was presented
9 successfully, there were no cracks to be filled by this unjust enrichment claim.²⁴

10 See Madrigal v. Hint, Inc., 2017 WL 6940534, * 5 (C.D. Cal. 2017) (“[L]egal and equitable
11 claims [including unjust enrichment] based on the same factual predicates are not true alternative
12 theories of recovery but rather duplicative.”). Even if pled with sufficient facts in the alternative,
13 the Liquidating Trustee’s unjust enrichment claim would fail as duplicative of its fraudulent
14 transfer claims.

15 For these reasons, the Liquidating Trustee’s ninth cause of action for unjust enrichment
16 must be dismissed for failure to state a claim upon which relief can be granted.

17 J. Part VI. E [sic] of the Complaint Fails to State a Plausible Claim for Conversion.

18 “To allege conversion, a plaintiff must show: (1) it possessed property, (2) the defendant
19 disposed of the property in a manner inconsistent with the plaintiff’s property rights, and (3)
20 damages.” Capital Partners, 828 F.3d at 1038. With respect to conversion, the Complaint
21 alleges:

22 130. CTG owned, possessed, or had the rights to immediate possession of the
23 proceeds from the sale of its assets, including CTG Advanced Materials.

24 131. Defendants wrongfully exercised dominion or control over the property.

25 132. CTG suffered injury as a result including but not limited to actual damages,
26 exemplary damages, pre- and post-judgment interest, and court costs.²⁵

27

²⁴ Id. at 672 (citations omitted) (emphasis added).

²⁵ Complaint, 25:8-15.

1 The Liquidating Trustee claims that its conversion claim is pled as an alternative claim for
2 relief.²⁶ Nowhere in the Complaint does the Liquidating Trustee state that its conversion claim is
3 pled in the alternative in the event the Liquidating Trustee is unsuccessful on its claims to avoid
4 alleged fraudulent transfers. The Liquidating Trustee incorporates by reference in paragraph 129
5 the Complaint's prior allegations and predicates its conversion claim upon the same facts that
6 both fail to state a plausible claim for avoidance of alleged fraudulent transfers and fail to
7 support a plausible alter ego theory of liability. Without such facts the Liquidating Trustee's
8 assertion that all of the "Defendants wrongfully exercised dominion and control over the
9 property" is a legal conclusion. Furthermore, the Liquidating Trustee has not alleged facts to
10 show that CTG ever owned, possessed, or was entitled to receive proceeds from the sale of
11 CTGAM. See Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1530 (9th Cir. 1995) ("As to the
12 conversion claims, the general allegation of ¶ 34 that this conduct involved unspecified acts of
13 mail and wire fraud fails to meet the particularity requirement of Rule 9(b)."). Hence, the
14 Liquidating Trustee's tenth cause of action for conversion must be dismissed for failure to state a
15 claim upon which relief can be granted.

16 K. Part VI. D [sic] of the Complaint Fails to State a Plausible Claim for Breach of Fiduciary
17 Duty.

18 In its eleventh claim for relief, the Liquidating Trustee asserts that the Blue Wolf Entities
19 breached one or more fiduciary duties owed to CTG, alleging:

20 134. A fiduciary relationship existed between BW Piezo and CTG. BW Piezo
21 was the controlling shareholder of CTG and owed CTG certain fiduciary duties
22 including but not limited to the duty of loyalty and utmost good faith, the duty of
23 candor, the duty to refrain from self-dealing, the duty to act with integrity of the
strictest kind, the duty of fair, honest dealing, and the duty of full disclosure.

24 135. BW Piezo breached their fiduciary duties owed to CTG by engaging in the
following conduct, which includes but is not limited to:

25 _____
26 26 Response to Grant Thornton LLP's Amended Motion to Dismiss (Docket No. 62) filed January
27 2, 2019, at 9:14-18.

- Self-dealing, including but not limited to,
 - Pursuing their self-interests at the expense of CTG and their obligations as fiduciaries;
 - Misdirecting CTG funds to pay for undue benefits and distributions for themselves; and
 - Using the advantage of their position to misappropriate CTG’s assets and proceeds from the sale of the same to themselves; and
 - Engaging in transactions on behalf of themselves that were not fair and equitable to CTG and violated their fiduciary duties to CTG.
 - Diverting funds that would have been retained by CTG, thereby rendering CTG insolvent and unable to pay its debts to its creditors.
 - Making improper corporate distributions in violation of California Corporate Code sections 17704.05.-06.²⁷

“To state a claim for breach of fiduciary duty, a complaint must allege the existence of a fiduciary duty, its breach, and damages resulting therefrom.” Neilson, 290 F. Supp. 2d at 1137; see 1849 Condominiums Assoc., 2010 WL 2557711, *4 (“The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage.”). Section 17704.09 of the California Corporations Code, upon which the Liquidating Trustee relies to establish a fiduciary relationship between the Blue Wolf Entities and CTG, states:

- (a) The fiduciary duties that a member owes to a member-managed limited liability company and other members of the limited liability company are the duties of loyalty and care under subdivisions (b) and (c).
 - (b) A member's duty of loyalty to the limited liability company and other members is limited to the following:
 - (1) To account to the limited liability company and hold as trustee for it any property, profit, or benefit derived by the member in the conduct and winding up of the activities of a limited liability company or derived from a use by the

²⁷ Complaint, 25:21-26:12.

- 1 member of a limited liability company property, including the appropriation
2 of a limited liability company opportunity.
- 3 (2) To refrain from dealing with the limited liability company in the conduct or
4 winding up of the activities of the limited liability company as or on behalf of
5 a person having an interest adverse to the limited liability company.
- 6 (3) To refrain from competing with the limited liability company in the conduct
7 or winding up of the activities of the limited liability company.
- 8 (c) A member's duty of care to a limited liability company and the other members in
9 the conduct or winding up of the activities of the limited liability company is
10 limited to refraining from engaging in gross negligent or reckless conduct,
11 intentional misconduct, or a knowing violation of law.
- 12 (d) A member shall discharge the duties of a limited liability company and the other
13 members under this title or under the operating agreement and exercise any rights
14 consistent with the obligations of good faith and fair dealing.
- 15 (e) A member does not violate a duty or obligation under this title or under the
16 operating agreement merely because the member's conduct furthers the member's
17 own interest.
- 18 (f) In manager-managed limited liability company, all the following rules apply:
- 19 (1) Subdivisions (a), (b), (c), and (e) apply to the manager or managers and not
20 the members.
- 21 (2) Subdivision (d) applies to the members and managers.
- 22 (3) Except as otherwise provided, a member does not have any fiduciary duty to
23 the limited liability company or to any other member solely by reason of
24 being a member.

25 Cal. Corp. Code § 17704.09.

26 First, because the Complaint fails to state a plausible alter ego claim against the Blue
27 Wolf Entities, the Liquidating Trustee's breach of fiduciary duty claim based upon an alter ego
theory of recovery is defective. Second, the Liquidating Trustee admits that CTG is a California
limited liability company,²⁸ and that BW Piezo is the sole member of CTG.²⁹ The Liquidating

²⁸ Id. at 3:5-6.

1 Trustee further admits that CTG is managed under the terms of an Operating Agreement dated
2 December 28, 2011, a copy of which is attached to the Complaint as Exhibit 1.³⁰ Because CTG
3 is a “manager-managed limited liability company,” section 17704.09(a), (b), (c) and (e) do not
4 apply to BW Piezo as the sole member of CTG. Cal. Corp. Code § 17704.09(f)(1). Except as
5 provided by subsections (d), BW Piezo does not have any duty to CTG by reason of being a
6 member. Id. at § 17704.09(f)(3). Given that the express language of subsection (a) limits
7 fiduciary duties applicable to a “member-managed limited liability company” to those set forth
8 in subsections (b) and (c), BW Piezo’s “obligation of good faith and fair dealing” under
9 subsection (d), as the sole member of a “manager-managed limited liability company,” when
10 read in conjunction with subsection (f)(1) does not appear to rise to the level of a fiduciary duty
11 under the terms of the statute. See Id. at § 17704.09(a), (d), (f)(1). Accordingly, the Liquidating
12 Trustee’s eleventh claim for an alleged breach of fiduciary duty by the Blue Wolf Entities must
13 be dismissed.

14 K. Leave to Amend.

15 Rule 15(a)(2) of the Federal Rules of Civil Procedure states that “[t]he court should freely
16 give leave [to amend] when justice so requires.” F.R.Civ.P. 15(a)(2).³¹ “Factors justifying a
17 denial of leave to amend include undue delay, bad faith, futility, unwarranted burdens on the
18 court, and the unfair burden on the opposing party.” Stanziale, 582 B.R. at 867. If a complaint
19 lacks facial plausibility, a court must grant leave to amend unless it is clear that the complaint’s
20 deficiencies cannot be cured by amendment. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th
21 Cir. 2002).

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²⁹ Id. at 7:9.

25 ³⁰ Id. at 7:4-11.

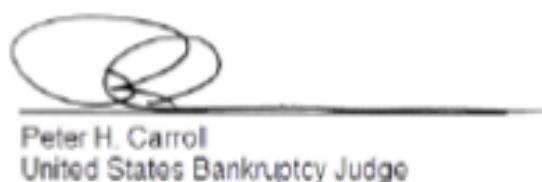
26 ³¹ Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

1 Nothing in the record suggests that the Liquidating Trustee has acted in bad faith or with
2 improper motive. Nor does the record establish undue delay. The Liquidating Trustee filed its
3 original complaint on October 12, 2018 and amended its complaint shortly thereafter on
4 November 5, 2018. The adversary proceeding has been pending only seven months. While
5 skeptical that the Liquidating Trustee can demonstrate a plausible claim for unjust enrichment
6 and breach of fiduciary duty, the court at this juncture is not convinced that the major
7 deficiencies in the Complaint cannot be cured by amendment. Therefore, leave to amend will be
8 granted.

9 CONCLUSION

10 As the Liquidating Trustee fails to state a claim upon which relief can be granted with
11 respect to each of the counts in the Complaint, the motions to dismiss under F.R.Civ.P. 12(b)(6)
12 will be granted with leave to amend. The Liquidating Trustee must file and serve his Second
13 Amended Complaint not later than June 28, 2019, to cure the deficiencies identified in this
14 memorandum. Defendants must file and serve a response to the Liquidating Trustee's Second
15 Amended Complaint not later than August 2, 2019.

16 A separate order will be entered consistent with this opinion.
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23 Date: May 31, 2019
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